Supreme Court, U.S.
FILED

98 888 NOV 16 1998

No. _____

In The

Supreme Court of the United States

October Term, 1998

RICHARD JOHNSON,

Petitioner,

v.

PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

LYNDE SELDEN II
Counsel of Record
SELDEN LAW FIRM
1230 Columbia St., Suite 1060
San Diego, CA 92101
(619) 515-1111

RICHARD H. ROSENTHAL, ESQ.
P.O. Box 1021
Carmel Valley, CA 93924
(831) 659-5193

For Petitioner Richard Johnson

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

14pp

QUESTION PRESENTED FOR REVIEW

What constitutes adequate content of notice of a settlement class action pursuant to FRCP, Rule 23(e) and the Constitution of the United States?

PARTIES TO THE PROCEEDINGS

The parties to the underlying action, *In Re Prudential Insurance Company of America Sales Practices Litigation*, pending in the United States Court of Appeals for the Third Circuit, are:

Petitioner, Richard Johnson, is a member of the nationwide settlement class, an objector to the proposed settlement, and intervenor in this matter.

Respondent, Prudential Insurance Company of America.

Other parties to the *In Re Prudential Insurance Company of America Sales Practices Litigation*, who are not parties to this appeal:

Richard P. Krell, Elizabeth Bajek, Amanda Bajek, Helen Bartsch, Mark Ciconte, Raymond Dolce, Margaret Dolice, Louise Duggan, Peter Duggan, Charles Duncan, Mary Howe, Mary Krell, William Morris, Diana Racer, Thomas Racer, Gweneth Reidel, The Estate of Carl J. Scalzo, Marie Scalzo, Terry Sligar, Alice Smith, Jerry Smith, and William Walton (represented by Malakoff, Doyle & Finberg). Krell, et al. are filing their own Petition for Certiorari.

STATEMENT OF CORPORATE DISCLOSURE

Petitioner is not a corporation and therefore has no parents or subsidiaries.

TABLE OF CONTENTS

Page

Questions Presented for Review i

Parties to the Proceedings ii

Statement of Corporate Disclosure iii

Table of Contents..... iv

Table of Authorities v

Statement of Jurisdiction..... 1

Rules Involved 1

Statement of the Case 1

Petitioner's Appendix on Appeal 3

A. Legal Authorities..... 3

Argument 5

Reasons for Granting the Writ 8

Conclusion 9

TABLE OF AUTHORITIES

Page

CASES

Amchem Products, Inc., et al. v. Windsor, et al., 521 U.S. 591 (1977), 1997 U.S. Lexis 4032, *65 8

Covey v. Town of Somers, 351 U.S. 141, 76 S.Ct. 724 (1956) 4

Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 94 S.Ct. 21402 (1976) 3

Gold Strike Stamp Co. v. Christiansen, 436 F.2d 791 (10th Cir. 1971) 4

In Re Domestic Air Transportation Antitrust Litigation, 141 FRD 534 (N.D. Ga. 1992) 3

In Re Nissan Motor Corporation Antitrust Litigation, 552 F.2d 1088 (5th Cir. 1977) 4

Ravens, et al. v. Syquest Technology, et al., 1997 U.S. Dist. Lexis 10332, *13 (N.D. Cal. January 7, 1997) 4

Robinson v. Union Carbide Corp., 544 F.2d 1258 (5th Cir. 1977) 4

Twigg v. Sears, Roebuck, 153 F.3d 1222, 1988 U.S. App. Lexis 21589, *16 (11th Cir. 1998) 3

RULES

Federal Rules of Civil Procedure:

Section 23(c)(2) 1, 3

Section 23(e) 1, 2, 3, 8

Manual for Complex Litigation, Third 3

STATEMENT OF JURISDICTION

The judgment appealed from, issued by the United States Court of Appeals for the Third Circuit, was entered on July 23, 1998. On or about August 18, 1998, a Motion for Stay of Mandate was filed with the United States Court of Appeals; and on October 28, 1998, the Court denied the motion without prejudice to the applicant's right to file a timely petition for writ of certiorari.

RULES INVOLVED

This case involves Constitutional due process and Federal Rule of Civil Procedure, Rules 23(e) and 23(c)(2).

STATEMENT OF THE CASE

In this case, the Notice of Class Action, Proposed Settlement, Settlement Hearing and Right to Appear was inadequate. It was too long, too confusing and failed to impart with clarity the information a reasonable class member needed to be sufficiently informed. The uptake rate is proof that class members did not understand the Notice. The Third Circuit ruled that the Notice was proper and adequate.

The case involved an effort by the parties to resolve by way of a class action any and all dissatisfaction any of Prudential's policyholders might have as the result of purchasing one or more of the 10.7 million life insurance policies Prudential sold between calendar year January 1, 1982 and December 31, 1995. A multi-state task force

(some 43 states' insurance departments ultimately participated in the task force investigation) had found that Prudential's insurance sales agents routinely lied to prospective policy holders to induce sales, that Prudential was aware of the problem and Prudential failed to take reasonable steps to mitigate the problem.

This case was settled by a compromise between the purported class representatives and the defendant before the Court had certified the case as a class action. Pursuant to FRCP Rule 23(e), the parties were bound to give " . . . notice of the proposed dismissal or compromise . . . to all members of the class in such a manner as the court directs". Herein, the district court directed that the Rule 23(e) Notice should consist of a 29-page court-captioned document (Appendix 469 to 503) and a 24-page Question and Answer text from defendant to the class members. (Appendix 504 to 537). Information in the Appellees' Joint Appendix (*See* A23) reveals that 1,596,263 total election forms were received out of a possible 10,700,000, an uptake rate of only 14.9% of the forms received. 492,394 (4.6% of the total) elected Basic Claim Relief while the balance elected Alternate Dispute Resolution. (10.5% of the total). A class member who elected ADR then received a 16-page claim form: statistics regarding how many completed claim forms were received remain to be revealed by the parties or the district court.

PETITIONER'S APPENDIX ON APPEAL

Petitioner Johnson adopts as his own the Appendix presented by co-petitioners Krell, et al., represented by attorneys Malakoff, Doyle & Finberg, P.C., The Frick Building, Suite 200, Pittsburgh, PA 15219-6003. Citations to the record herein are to said Appendix.

A. LEGAL AUTHORITIES

The requirements for Rule 23(e) Notice are the same as for the notice required pursuant to Rule 23(c)(2), i.e., " . . . the best notice practicable under the circumstances." *Manual for Complex Litigation*, Third, p. 227[1] All the cases and authorities emphasize that notice to the class should be succinct and simple, (*Manual*, Third, at 225) that it should be understandable insofar as possible to the average absentee class member, (*Twigg v. Sears, Roebuck*, 153 F.3d 1222, 1998 U.S. App. Lexis 21589, *16 (11th Cir. 1998), and that it should convey its message in a meaningful way. *In Re Domestic Air Transportation Antitrust Litigation* 141 FRD 534, 554 (N.D. Ga. 1992). Often the Notice is the first inkling of information that class members' receive to the effect they have been wronged or injured by the class defendant. The purpose of the notice, whether it be the notice required by 23(c)(2) or by 23(e), is to provide information a reasonable person would consider material

---

[1] "Settlement notices are subject to many of the same considerations outlined above for certification notices." Because the identities of class members were known through Prudential's records, first class mailed Notice of the class action settlement was constitutionally mandated. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175-176, 94 S.Ct. 21402, 2150-51 (1976).

in making an informed, intelligent decision of whether to opt out or remain a member of the class. *In Re Nissan Motor Corporation Antitrust Litigation*, 552 F.2d 1088, 1105 (5th Cir. 1977).

Courts have acknowledged that a confusing presentation of information, or one that is too detailed, fails to satisfy the criteria of " . . . best practicable under the circumstances," (*Gold Strike Stamp Co. v. Christiansen*, 436 F.2d 791, 799 (10th Cir. 1971)). One Court recently objected that a complaint cannot constitute "the best practicable [notice] under the circumstances" where it is lengthy, turgid, burdensome and prolix, so much so that an inquiring mind " . . . would not be able to divine the legal and factual basis of plaintiff's claim". *Ravens, et al. v. Syquest Technology, et al.*, 1997 U.S. Dist. Lexis 10332, *13 (N.D. Cal. January 7, 1997).

Mailed notice is insufficient where the recipient is known to be someone who could not understand it. *Covey v. Town of Somers*, 351 U.S. 141, 76 S.Ct. 724 (1956). Complaints to the U.S. Senate, Securities Subcommittee reflect concerns that class action settlement notices " . . . are often obtuse and confusing, and should be written in plain English." 141 Cong. Rec; H13691 *H13701, p. 40. A confusing Rule 23 Notice impermissibly encumbers an absent class member's right to benefit from the class action. *Robinson v. Union Carbide Corp.*, 544 F.2d 1258, 1265 (5th Cir. 1977).

ARGUMENT

The preceding descriptions, observations and rules of law are appropriate to illustrate the deficiencies in the Notice herein. It is too long, it is too detailed, it is vague regarding the plaintiff's complaints, it is confusing, and no reasonable absent member of the settlement class could divine his or her rights or make an informed decision regarding remaining in, opting out, or choosing relief.

In fairness to absent class members, the district courts and circuit should "dumb down" their reading of the Notice to insure the Notice is comprehensible to the average absent class member. Not only is the Court's first glimpse of the Notice in the charged atmosphere of a legal proceeding, an ambience absent at the kitchen table where class members first read the Notice, the Court knows what is planned in the settlement, has heard the proposal and is aware of the issues in the litigation that prompted the settlement class in the first instance.

In its opinion[2] the Third Circuit allowed that the settlement required " . . . some understanding of insurance policies," at least as far as understanding misrepresentations of financed insurance, abbreviated payments and investment plans were concerned. (Appendix 111). The Third Circuit noted, too, that the "catch-all category is by its nature difficult to describe." (Appendix 110). The

---

[2] Pages 83 to 87 of the Third Circuit's Opinion constitute the Respondent Court's ruling on the adequacy of Notice. (Appendix 106 to 111).

conclusion reached by the Third Circuit that, nevertheless, the Notice was adequate, simply flies in the face of common knowledge: people do **not** understand their life insurance policies, except the duty to pay premiums in return for a death benefit.

Upon its receipt, the very bulk of the notice would deter most absent class members from reading it. Although the gist of the Complaint, and the findings of the Multi State Task Force, was that Prudential had cheated its policyholders by lying about life insurance policies, premiums and investments, such perfidy is only hinted at, and for the first time only, at page 5:

> " . . . that Prudential engaged in a common course of conduct through which life insurance was improperly sold through misrepresentations concerning:
>
> . . . "

Thus, the gravamen of the class action was sanitized from "fraud" to "misrepresentation", and not until too far into the Notice (page 5) to expect many absent class members to still be reading. (Appendix 476).

Although **all** class members were entitled to Basic Claim Relief ("BCR"), it is not addressed in the Notice until after a presentation of the numbing minutiae of the Alternative Dispute Resolution Process – relevant only to that class member "who believe[s] that he or she was misled." (Appendix 481). That only 4.6% of the policyholders asked for even BCR attests to the incomprehensibility of the Notice. Wholly unimportant details of the ADR review process are spelled out in agonizing depth. For example at page 9, the "ADR Claim Review Process",

describes the two or three levels of review and the pedigree of the persons performing the review. (Appendix 484 to 485). What absent class members need to know is that their claim gets scored, and if they are not satisfied with the scoring, the claim will be scored by an "impartial decision-maker" and the class member will be able to have a Representative to assist him or her. Whole lines and paragraphs of additional detail are supplied, camouflaging the material with the immaterial.

Nor is there any good reason in the Notice to explicate ADR before assuring class members they are **entitled** to BCR. This entitlement is not first described until at page 11: "All Class Members will be eligible for Basic Claim Relief". (Appendix 489).

The Notice's disclosure of potential "Income Tax Consequences", at page 15, is surely unnecessary to the vast majority of class members, and could easily have been excluded. (Appendix 496). Written in boldface type, its inclusion can best be characterized as a "Poison" sign at the oasis, for those class members persistent enough to have read this far.

A reader of this Notice, even one with training in the law and grammar, cannot divine the class complaints or his rights in the proposed settlement. Not only is the length of the Notice an impediment to knowledge, as well as the pasteurization of the allegations of the Complaint, the settlement rights are described in dizzying detail and circular logic – not one person who reads the Notice **knows** what he or she will receive in settlement, nor even its value. Nowhere is it explained why a class member would elect ADR instead of BCR, except perhaps a

"belief" of being misled. What that "belief" feels like, or why it might arise invites idle and aimless speculation by class members as to whether or not they were misled and about what.

REASONS FOR GRANTING THE WRIT

Settlement class actions, burgeoning in use as they are, affect the lives of millions of Americans. Virtually unregulated except by judicial review, Rule 23 requires ever more vigilant supervision to insure that due process is afforded to millions of absent class members. While recognizing but not deciding in *Amchem Products, Inc., et al. v. Windsor, et al.*, 521 U.S. 591 (1997), 1997 U.S. Lexis 4032, *65, the gravity of whether adequate notice " . . . sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous," the facts presented in this Petition raise the precise issue: What constitutes adequate content of notice of a settlement class action, both constitutionally and pursuant to Federal Rules of Civil Procedure, Rule 23(e)?

CONCLUSION

For the reason set forth above, petitioner Richard E. Johnson, respectfully requests that his petition for writ of certiorari be granted.

Respectfully submitted,

LYNDE SELDEN II
Counsel of Record
SELDEN LAW FIRM
1230 Columbia Street, Suite 1060
San Diego, California 92101
(619) 515-1111

RICHARD H. ROSENTHAL
P.O. Box 1021
Carmel Valley, California 93924
(831) 659-5193

Attorneys for Petitioner